

### QUESTION PRESENTED

The sole question presented here is whether the doctrine announced in the case of *Griffin v. California* should be given retroactive application?

## II.

### TABLE OF CONTENTS

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	Page
Question Presented .....	I.
Statement of the Case .....	1
Argument .....	2
The rule of <i>Griffin v. California</i> should not be retroactively applied to judgments which were finalized in the states' courts prior to April 28, 1965. ....	2
A. The Constitution neither prohibits nor requires retrospective application .....	4
B. There is a considerable difference between a basic right and an evidentiary procedural right	6
1. Denial of a basic right precludes a fair trial	6
2. Violation of a procedural right does not necessarily preclude a fair trial .....	7
C. The purpose for the rule is to prevent (future) infringements upon an accused's privilege against self incrimination .....	9
D. Retroactive application would not further its purpose .....	10
E. Retroactive application of the rule to Respondent's case would not further its purpose .....	13
Conclusion .....	14

### III.

#### TABLE OF AUTHORITIES

Cases:	Page
Adamson v. California, 332 U.S. 46, 67 S. Ct. 1672 ....	3, 11
Bailey v. Richardson, 182 F.2d 46 .....	4
Bruno v. United States, 308 U.S. 287, 60 S. Ct. 198 ...	3
Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792 ....	4, 6
Griffin v. California, 85 S. Ct. 1229 .....	2, 4
Griffin v. Illinois, 351 U.S. 12 .....	4, 6
Hilvering v. Griffiths, 318 U.S. 371 .....	4
Jackson v. Denno, 378 U.S. 368 .....	6
Linkletter v. Walker, 33 Law Weekly 4576 .....	5
Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489 .....	3, 13
Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684 .....	4
Sisk v. Lane, 331 F.2d 235 .....	10
Twining v. New Jersey, 211 U.S. 78, 29 S. Ct. 14 ....	3, 11
United States v. Schooner Peggy, 1 Cranch 103 (1801)	6
Wolf v. Colorado, 338 U.S. 25, 69 S. Ct. 1359 .....	8
State Constitutions:	
California Constitution, Article I, Section 13 .....	3, 11
Ohio Constitution, Article I, Section 10 .....	3, 11
Other Authorities:	
Blackstone Commentaries 69 (1769) .....	4
Cardozo, Address to N.Y. Bar Assn., 55 Rep.N.Y. State Bar Assn., 263, 296, 297 (1932) .....	4
Cardozo, The Nature of the Judicial Process (1921) ..	4
Levy, Realist Jurisprudence and Prospective Over- ruling, 109 U.Pa.L.R. 1 .....	4
Retroactive Legislation, 13 Encyc. Social Science 355 (1934) .....	4

In the  
**Supreme Court of the United States**

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**October Term, 1965**

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**No. 52**

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**DAN TEHAN, SHERIFF OF HAMILTON  
COUNTY, OHIO,**

**Petitioner,**

**vs.**

**UNITED STATES OF AMERICA EX REL.  
EDGAR I. SHOTT, JR.,**

**Respondent.**

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**BRIEF OF PETITIONER**

**STATEMENT OF THE CASE**

On May 12, 1961, the Grand Jury of Hamilton County, Ohio, returned an indictment in which the Respondent, Edgar I. Shott, Jr. was charged in two separate counts, with selling a security without a license (in violation of Section 1707.44 (A), Revised Code of Ohio) and with selling an unregistered security (in violation of Section 1707.44 (C), Revised Code of Ohio). Upon the trial, Shott's attorney made several factual admissions and stipulations but Shott did not personally take the stand or testify. Both the assistant prosecuting attorney, and the court, commented upon Shott's failure to testify. The jury returned a verdict finding Shott guilty as charged, and the court imposed a sentence to be served in the Ohio Penitentiary.

Thereafter, on December 11, 1961, the Court of Appeals, First Appellate District of Ohio, Hamilton County, Ohio, affirmed the judgment of conviction. On June 27, 1962, the Supreme Court of Ohio dismissed the Respondent's appeal, overruled his Motion for Leave to Appeal, and affirmed the judgment. A motion for rehearing was denied by said Court on October 3, 1962.

Certiorari was denied on May 13, 1963, and, on June 17, 1963, a petition for rehearing was, likewise, denied. Before the mandate, issued by the Supreme Court of Ohio to the Petitioner herein, was carried into effect, the Respondent filed a habeas corpus proceeding in the United States District Court for the Southern District of Ohio, Western Division, which proceeding was dismissed. From that order of dismissal, the Respondent appealed to the United States Court of Appeals for the Sixth Circuit. That Court, on the basis of *Malloy v. Hogan*, (decided the day before Respondent's hearing), set aside the order of the District Court and remanded the case for further proceedings. From that decision, the Petitioner petitioned for a Writ of Certiorari and an Order Allowing Certiorari was subsequently entered on May 24, 1965.

## ARGUMENT

### THE RULE OF *GRIFFIN* vs. CALIFORNIA SHOULD NOT BE RETROACTIVELY APPLIED TO JUDGMENTS WHICH ARE FINALIZED IN THE STATES' COURTS PRIOR TO APRIL 28, 1965.

In the case of *Griffin v. California*, 85 S.Ct. 1229 (decided April 28, 1965), this Court determined that the self-incrimination clause of the Fifth Amendment is made applicable to the States by the Fourteenth Amendment; and

that the trial court's and the prosecutor's comments on the accused's failure to testify in that case violated the self-incrimination clause of the Fifth Amendment. The self-incrimination provision of the Fifth Amendment, prior to *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, had been held applicable only to federal proceedings. *Adamson v. California*, 332 U.S. 46, 67 S.Ct. 1672, *Twining v. New Jersey*, 211 U.S. 78, 29 S.Ct. 14, *Bruno v. United States*, 308 U.S. 287, 60 S.Ct. 198. And this case, now before the Court, presents the question of whether the (*Griffin v. California*) doctrine should be applied to operate retrospectively upon cases, in which such comment was made, which were finally decided prior to April 28, 1965. It is respectfully submitted that this new concept should be given only prospective application.

At the time of the Respondent's trial, Ohio, as did California, permitted comment on the defendant's failure to testify by means of an explicit constitutional qualification of the privilege against self-incrimination. Ohio Const. Article I, Section 10; California Const. Article I, Section 13. Four additional states (New Jersey, Iowa, Connecticut and New Mexico) also permitted such comment, prior to *Malloy v. Hogan*, but the permission to do so in these states was not based upon constitutional amendments.

Beginning with *Malloy v. Hogan*, *supra*, wherein the Court required (on the subject of an accused's silence) that the same standards be applied in both federal and state proceedings, and that case was followed by the rule of *Griffin v. California*, *supra*, forbidding comment on the accused's silence through the Fifth Amendment (in its bearing on the States by reason of the Fourteenth Amendment), it appears that the position of the present doctrine is directly opposite that of the previously known require-

ments of Constitutional due process and, as such, the doctrine is similar in effect to such recent cases as *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, *Griffin v. Illinois*, 351 U.S. 12, and *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684. The Court's silence (in *Griffin*) on the subject of retrospective application of the doctrine is the basis for now bringing that question squarely into focus.

#### **A. The Constitution Neither Prohibits Nor Requires Retrospective Application.**

Without intending to here become enmeshed in an academic review of the historical background of the retrospective-prospective problem involved, such review reveals the evolution of the Court's approach to the subject from one of absolute retrospectivity, under the Blackstonian rule (Blackstone Commentaries 69 (1769)), Retroactive Legislation 13-Encyc. Social Science 355 (1934) to the trend toward prospective overruling, suggested as the remedy by the (Blackstonian) critics, (Cardozo, Address to New York Bar Association, 55 Rep. N.Y. State Bar Assn. 263, 296, 297 (1932); *Hilvering v. Griffiths*, 318 U.S. 371; *Bailey v. Richardson*, 182 F.2d 46, affirmed in 341 U.S. 918; Levy, Realist Jurisprudence and Prospective Overruling, 109 U.Pa.L.R. 1; and Cardozo, The Nature of the Judicial Process (1921), and finally to the most recently developed judicial methods of prospective-retrospective application which more closely approach the achievement of substantial justice by respecting bona fide expectations under the (pre-existing) law. These newly developed judicial methods are prospective in that the over-ruling disposes of outmoded precedents, and are retrospective only to those cases which have not yet been finalized in the State courts. In this way there need be no disappointment to the expectations of



the parties. "Thus, the accepted rule today is that in appropriate cases the Court may in the interest of justice make the rules prospective." *Linkletter v. Walker*, 33 Law Weekly 4576 at 4579. In that case the Court discussed the prospective trend of the cases dealing with the invalidity of statutes and the effect of decisions overturning long established rules and concluded that the Constitution does not prohibit retrospective application, and neither does it require it. With this basic premise, the Court then reasoned that the decision of applying a subsequent ruling of invalidity to prior final judgments must be preceded by the weighing of the merits and demerits in each case, considering the prior history of the rule in question, its purpose and effect, and whether retrospective application will, in fact, be a deterrent to its future operation. Although the reasoning, in this case, was directed specifically to the Fourth Amendment's prohibitions pertaining to unreasonable searches and seizures it is respectfully submitted that, that approach taken is equally applicable to matters concerning the Fifth Amendment's privilege against self-incrimination.

In other words, this Court determined (in the *Linkletter* case, *supra*) that the question of retrospective application of an overruling decision is not subject to any set principles of retroactivity, but depends, instead, upon a number of considerations, i. e. vested rights, public policy with reference to the rule and its prior application, the purpose of the rule, and the administration of the Courts; and that the Courts should inquire into, and weigh, each of these considerations before deciding whether to give the new rule a retroactive effect.

The Court, in which the issue has been properly presented, should first concern itself with determining the



purpose of the new (overruling) rule. Once such an identification has been made, the Court should weigh the balance to determine whether an absolute general retrospective application will serve that purpose. And lastly, but of equal importance, the Court should determine whether a retrospective application of the new rule will accomplish and promote that purpose in the case then before it.

## **B. There Is A Considerable Difference Between A Basic Right And An Evidentiary Procedural Right.**

### **1. Denial Of A Basic Right Precludes A Fair Trial.**

While the trend of the cases appears to be toward prospective overruling, or perhaps it is better stated to say that the trend indicates a retreat from absolute retrospective overruling, application of a complete or absolute prospective overruling falls far short of being a total remedy to the problem. In some cases retrospective application has been found to be not only desirable but, considering all of the factors involved, equitably mandatory. *Griffin v. Illinois*, 351 U.S. 12, *Gideon v. Wainwright*, 372 U.S. 335, *Jackson v. Denno*, 378 U.S. 368, and other cases dating back to *United States v. Schooner Peggy*, 1 Cranch 103 (1801). These cases, it should be noted, all deal with what has been referred to as arbitrary violations of basic rights.

In the *Schooner Peggy* case there were at least two decisive and important considerations which directed the Court into retrospective application: (1) the intervening treaty was actually framed in words which made it retroactive, and (2) the fact that (as Chief Justice Marshall pointed out) this was a case of considerable national and international concern; a case with important foreign policy implications. Chief Justice Marshall, in recognizing these

two considerations, indicated that finding retroactivity necessary in such delicate circumstances would not make the requirement of such application inevitably necessary in cases not charged with similar national and international significance.

In *Griffin v. Illinois*, the Court ruled that the denial of an appeal to an indigent prisoner simply because of an inability to pay (the cost of a transcript) was the denial of "an integral part of the (Illinois) trial system for finally adjudicating the guilt or innocence of a defendant". The court based its decision upon the premise that precluding an appeal because a defendant was without funds amounted to the denial, to impoverished persons, of the right to a fair trial. In *Gideon v. Wainwright*, the Court determined that a layman's right to counsel, so that his defense could adequately be presented in the trial, was a fundamental right. In short, it appears that in the cases applying the overruling rules retrospectively, the Court first finds that the (complained of) violation had to do with some clearly recognized basic right, a denial of which precludes the accused's getting a fair trial.

## 2. Violation Of A Procedural Right Does Not Necessarily Preclude A Fair Trial.

As against the findings made in those (*Griffin v. Illinois*, *Gideon v. Wainwright*, etc.) cases, this Court recently decided that the rule of *Mapp v. Ohio* should not be applied retroactively (*Linkletter v. Walker, supra*) because although "the error complained of might be fundamental it is not of the nature requiring us to overturn all final convictions based upon it." Until this decision, the various Courts of Appeal became involved in many conflicts and splits of

authority about whether or not the *Mapp* rule should be applied retroactively; those courts became virtual battlegrounds for the proponents and the opponents of that decision. The Court's reasoning and decision, in the *Linkletter* case, *supra*, settled those conflicts.

It is contended here that the Court's rule in the *Griffin v. California* case, *supra*, should not be retrospectively applied based upon the same background and reasoning as is stated in the *Linkletter* case. It is respectfully submitted that, that background and reasoning is most relevant and pertinent to the Petitioner's contention. There are marked similarities between the *Mapp* case and the *Griffin* case and therefore, it is submitted that the reasoning for the refusal to retrospectively apply the *Mapp* rule should likewise be applied in the determination of whether the *Griffin v. California* rule should be applied retrospectively. The *Mapp* case overruled *Wolf v. Colorado*, 338 U.S. 25, 69 S.Ct. 1359, in which case the federal exclusionary rule of evidence was held not to be applicable to the state courts. *Griffin v. California* overruled *Adamson v. California*, in which case this Court decided that the Due Process Clause of the Fourteenth Amendment does not preclude, or forbid, the prosecution's comment upon an accused's failure to testify. In both the *Griffin* case and in the *Shott* case now before the court there were prior reliances upon the comment rule. This rule is, in substance, a rule of evidence embodied in the State Constitution and strengthened by the *Adamson* decision. The *Mapp* decision extended the federal exclusionary rule of the Fourth Amendment to the states, and to the state courts, through the Fourteenth Amendment. The *Griffin v. California* case extends the self-incrimination provisions of the Fifth Amendment to the states, and to the state courts, through the Fourteenth

Amendment. The doctrine of that case, which is in a sense an exclusionary rule of evidence (very much like *Mapp*), has no direct bearing upon the guilt of an accused. Comments upon an accused's failure to testify might very well have had no effect upon the outcome of the trials of cases previously decided.

**C. The Purpose For The Rule Is To Prevent (Future) Infringements Upon An Accused's Privilege Against Self-Incrimination.**

The Court, in the *Mapp* case, found that the purpose for that rule was to create an effective deterrent to illegal police action in obtaining evidence. Similarly, it is submitted, the purpose for the rule in *Griffin* is to prevent (future) infringements upon an accused's privilege against self-incrimination; to eliminate a procedural rule which forces persons accused of crimes to take the stand and testify or be penalized for remaining silent. The Court, in that case said,

"The question remains whether statute or not, the comment rule . . . violates the Fifth Amendment.

"We think it does. It is in substance a rule of evidence that allows the state the privilege of tendering to the jury for its consideration the failure of the accused to testify . . . . It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making the assertion costly." (*Griffin v. California, supra*, at pages 1232 and 1233.)

It is therefore submitted that, unlike *Gideon v. Wainwright*, *Griffin v. Illinois*, and the other cases in which the Court found retrospective application necessary because of viola-

tions of specific basic minimal rights, the Court's language, in *Griffin v. California*, *supra*, i.e. "in substance a rule of evidence" and "a penalty imposed by courts for exercising a constitutional privilege" is not of a nature which requires the overturning of all final convictions based upon (the comment rule) it.

The Court in *Sisk v. Lane*, 331 F.2d 235, in commenting upon the reasoning in the *Mapp* case, stated the following:

"We think the exclusionary rule in *Mapp* has been implicit in the Fourth Amendment since the Bill of Rights was adopted, and implicit as against the states since the adoption of the Fourteenth Amendment. But we think that it was not made explicit as a controlling constitutional rule until the *Mapp* decision in 1961. Consequently we think retroactive application of the rule is not a necessity, as though the rule existed before *Mapp* and bound state courts."

The Petitioner contends that this reasoning, as pertains to the *Mapp* rule, because of the marked similarities in the *Griffin v. California* case with that case, should be equally applicable in deciding the issue presently before the Court.

The *Griffin* case rule is substantially an exclusionary rule of evidence and, as such, is very similar to the *Mapp* case and is unlike the *Gideon* case wherein the Court refers to the "fundamental nature of the right to counsel."

#### **D. Retroactive Application Of The Rule Would Not Further Its Purpose.**

The Court decided that the rule in the *Mapp* case was to deter future violations. Therefore, in using the same comparison as has been previously stated, a deterrent effect being the basic purpose intended in the *Griffin* case, that purpose would not be furthered, or accomplished, by

applying the new rule retrospectively. The deterrent effect is intended to compel respect for a new concept of the Constitutional guarantees and, as such, retroactive application of the new rule to all cases (even those finally decided in the State courts prior to *Malloy v. Hogan*) would not serve that purpose. The cases finally decided before *Malloy v. Hogan*, and *Griffin v. California*, were tried in light of, and in reliance upon, the rules set out in the State Constitutions (Ohio and California) and the cases then endorsing such rules (*Adamson* and *Twining*).

The people of the State of Ohio, in their Constitution of 1912, provided for the commenting upon an accused's failure to testify (Ohio Const. Article I, Section 10). California, by a similar constitutional provision, also permitted comment upon the failure of an accused person to take the stand and testify (California Const. Article I, Section 13). And, in addition, such comment has been recognized in the States of New Jersey, Iowa, Connecticut and New Mexico though not by express constitutional provisions. Accordingly, thousands of cases prior to *Griffin v. California* have been tried in the various state courts and finally decided on this procedural (comment) rule. Comments were made about accused persons not having testified, courts have instructed juries about the application of such rule, and "guilty" verdicts have been returned.

This Court heretofore, by refusing to include the Fifth Amendment's protection against testimonial compulsion in the guarantee of the Fourteenth Amendment (*Adamson v. California*, 332 U.S. 46, 1902; *Twining v. New Jersey*, 211 U.S. 77) in effect endorsed the states' rights to the making, adopting and following such (comment) rules. This Court, in *Adamson v. California*, *supra*, stated:

"The dilemma created by California's law which permits . . . his failure to explain or deny evidence against him to be commented upon by court or counsel and to be considered by court or jury, does not involve such a denial of due process as to invalidate a conviction . . ."

It is submitted that, just as the existence of the *Wolf* doctrine, prior to *Mapp*, was considered, in *Linkletter*, to have been an "operative fact", so too should the existence of the *Adamson* doctrine and *Twining* doctrine, prior to *Griffin v. California*, be considered to have been an operative fact within the same meaning, purpose and effect.

Because of the reliances upon the procedural rule as it was then thought to exist, all of the thousands of cases finally decided on the basis of *Adamson* and *Twining*, prior to *Malloy v. Hogan* and *Griffin v. California*, should be considered to have become vested and, therefore, should not now be disturbed by a retrospective application of the *Griffin* rule. The law of the land permitted the making of comment upon the failure of an accused to testify and it was the duty of the appellate courts to uphold that right. A subsequent denial or overruling of that right (to comment) should not be extended to mean that, that power never existed. To hold otherwise would be catastrophic to the administration of justice.

Although not decisively controlling in the determining of the issue here presented, another factor should be considered. The taking of a new constitutional concept, such as the rule of *Griffin*, and applying it with absolute retroactivity would create a tremendous burden upon the courts of the land by reason of the filing of countless numbers of petitions for writs of habeas corpus by incarcerated prisoners. It is submitted to this court that the numbers of



such cases, likely to result from an absolute retroactive application of the *Griffin* rule, would be of a volume which the courts would be unable to handle with any degree of administrative efficiency and reasonable expenditure of time. And, if the rule were thus applied, such application would not result in a fair application to all prior cases. An uneven application would tend to encourage a disrespect for the sanctity of the judicial system and such disrespect would seriously affect the whole judicial system. An unfairness, in applying the rule retroactively, would result, for example, where persons were convicted in trials in which no transcript of the trial was made. Only those prisoners who could prove that they were denied due process by reason of the prosecution's comments would be entitled to succeed on a petition for release. Or, countless applications would be made by prisoners claiming to have been convicted solely on the basis of such comment, which claims (there being no transcript) could neither be proved or disproved.

**E. Retroactive Application Of The Rule To Respondent's Case Would Not Further Its Purpose.**

A retroactive application of this (*Griffin*) rule would presuppose that in all cases decided prior to April 28, 1965, the date of the *Griffin* decision, or prior to the decision in *Malloy v. Hogan*, 378 U.S. 1, decided in 1964, the guilty verdicts were based solely upon the comments made concerning the failure of the accused to testify and that, therefore, those persons were denied fair trials. In particular, it would presuppose that the Respondent was found guilty solely upon the basis of the comments made. A review of the record filed in this case will reveal that such supposition would be inaccurate.

In keeping with the Court's reasoning in *Linkletter*, the primary purpose of the *Griffin* case being to eliminate a procedural rule which forces persons accused of crimes to take the stand and testify or be penalized for remaining silent, it is submitted that a retroactive application of *Griffin* to the instant case would not at all further the deterrent effectiveness of the rule.

The Respondent was tried, convicted and his case finally decided many months prior to *Griffin*. In the trial of the case, the prosecution, the defense and the court itself had a right to, and did, rely upon the validity of the state trial procedure permitting comment and that such procedure fell within the standards of due process (as they were defined by this court at the time). To apply the newly defined constitutional concept of prohibiting comments upon an accused's failure to testify retroactively to this (*Shott*) case will in no way, further the deterrent purpose obviously intended for the rule.

### CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should hold that the rule of *Griffin v. California* is not retrospectively applicable to finalized judgments of conviction; and that the decision of the Sixth Circuit Court of Appeals, in the Respondent's case, should be reversed.

Dated: Cincinnati, Ohio, September 9, 1965.

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